No. 14584

United States Court of Appeals

For the Ninth Circuit

LOUIS GOLD, doing business as the GOLD DESK AND SAFE COMPANY,
Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy of the Estate of ROBERT STEINBERG, doing business as PACIFIC LITHO-ART COMPANY, AMALGAMATED CREDITORS EXCHANGE and JERRY'S MARKET, Bankrupt,
Appellee.

Appellant's Brief

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WESTERN PRINTING COMPANY, WHITTIER

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Appellant's Brief

STATEMENT OF PLEADINGS

This is an appeal from an Order of the United States District Court dated September 15, 1954 (Transcript of Record, page 27) adopting the findings of the Referee in Bankruptcy and confirming the Order of the Referee denying the petition of Louis Gold, doing business as the Gold Desk and Safe Company, the Appellant, for the recovery of certain furniture and fixtures.

The proceedings in connection with Robert B. Steinberg, a Bankrupt, was initiated by a Chapter Eleven

proceeding for an arrangement filed in the United States District Court for the Southern District of California, Central Division (Transcript of Record, page 3). The debtor's petition was approved and the Order of Reference to David B. Head, Referee in Bankruptcy, under Section 322 of Chapter Eleven of the Bankruptcy Act, was entered on January 27, 1954 (Transcript of Record, page 10). The Order of Adjudication in Bankruptcy was dated April 21, 1954 (Transcript of Record, page 11).

On February 19, 1954 a Reclamation Petition was filed by Appellant for the recovery of certain named office furniture and equipment from H. M. Gerson, Trustee in Bankruptcy (Transcript of Record, page 12).

There was a hearing on said Petition before the Honorable David B. Head, Referee in Bankruptcy, on February 26, 1954. A memorandum on the Petition for Reclamation was filed on June 7, 1954 (Transcript of Record, page 18). Findings of Fact, Conclusions of Law and Order thereon was entered by said Referee on January 24, 1954 (Transcript of Record, page 20). A Petition for Review from the Order of Referee denying petition for Reclamation Petition was filed by Appellant on July 3, 1954 (Transcript of Record, page 24), and the matter was heard by the Honorable Leon R. Yankwich, United States District Judge, on September 13, 1954. The Order adopting the findings of the Referee and approving the Order of the Referee was entered on September 15, 1954 (Transcript of Record, page 27).

It is submitted that the Order appealed from is a final judgment on the matter and that this Court has jurisdiction to hear this appeal under U.S.C.A. Title 28, Article 225.

STATEMENT OF THE CASE

Robert B. Steinberg, the bankrupt, was by profession a Public Accountant. His other interests consisted generally of the following: He operates a collection agency; he is the sole owner of a printing company known as Pacific Litho-Art Company; he has a partnership interest in a hotel and an apartment building; he has an interest in an accounting firm, and owns a grocery store (Transcript of Record, page 8).

On January 23, 1953 the Appellant entered into a transaction for the acquisition by the bankrupt of certain office furniture and office equipment (Transcript of Record, page 32). The selection of the various items were made by the bankrupt, and although tentative prices were discussed, no definite purchase price for the furniture and equipment was set up. The approximate amount of the furniture selected by the bankrupt was $4,000.00 (Transcript of Record, page 33). It is uncontradicted that the bankrupt received all of the furniture and equipment listed in the Reclamation Petition. The documentary evidence consists in part of several invoices and/or delivery sheets (Petitioner's Exhibit I). It will be noted that the invoices dated February 14, 1953 and February 16, 1953 list

the major items of the furniture sought to be reclaimed. At the bottom of each document is the following:

> "It is agreed that the purchaser shall pay $..... on execution of this agreement and the sum of $..... on each....., commencing.....
>
> The purchaser, and/or lessee, agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co. until entire purchase price has been paid and purchaser and/or lessee, agrees to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses for collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above listed merchandise shall be as and for liquidated damages. At the option of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this Agreement.
>
> The above goods received in good order.
>
> ..... Signed.....
>
> Buyer.
>
> By....."

Both the alleged agreement and the receipt had been signed by the bankrupt. None of the blank spaces in the above had been filled in except the signatures that are subscribed thereon.

The testimony of the Appellant discloses that some of the bankrupt's old furniture was to be taken in trade

and an allowance of $500.00 would be made; that the bankrupt agreed to pay the Appellant a rental of $100.00 a month, which was to be on account until the purchase price of the furniture was to be determined; and after the determination of the purchase price the Bankrupt was to pay $100.00 per month until the purchase price was paid (Transcript of Record, page 32 and page 33). It is uncontradicted that the parties never got together and determined the purchase price of the equipment.

It is to be noted that the Appellant's account record does not disclose a charge for the purchase price of the furniture nor a credit for the Bankrupt's old furniture as a trade-in; that the records do show a credit on account of the following payments made by the Bankrupt after February 14, 1953, to wit: March 30, 1953 $100.00; May 1, 1953 $100.00; June 7, 1953 $100.00 (Petitioner's Exhibit No. 2). This is admitted by the Appellees.

The testimony of the Bankrupt discloses that the gross amount of the new furniture was over $3,000.00, and that he would receive an allowance in the neighborhood of $800.00 for his old furniture (Transcript of Record, pages 43 and 44); that no definite price was determined; and that the only agreement that was made by the parties was that the Appellant would allow him to pay direct at the rate of $100.00 a month, and that the account would not be put through any finance company nor would any interest be charged on the account (Transcript of Record, page 45).

On cross examination the Bankrupt testified that the signatures on the invoices dated February 14, and February 16, 1953 were his, and that he examined the invoices before signing them, and that he did sign the agreement clause on the invoice and the receipt on the invoice (Transcript of Record, pages 49, 50 and 51); and that the Appellant told him that as soon as he could, they would get together and determine the exact amount of the purchases, the amount of the trade-in allowance and preparation of the necessary papers (Transcript of Record, page 52).

There is no evidence in the record that the transaction was to be on an open account basis. At the first hearing the Referee made the statement "What you have here is an executory contract under Section 70-B of the Bankruptcy Act." (Transcript of Record, page 35).

ISSUES INVOLVED

Appellant's Contentions:

1. That the documents signed by the Bankrupt were valid title retention agreements.

2. That the original transaction was an executory contract between the parties to be finally consummated on the determination of the purchase price, and, that during such interim the title to the furniture would remain in the seller.

3. That the goods were not sold on open account, nor was there any intention of the parties that same was to be sold on open account.

Appellee's Contentions:

1. That the goods were sold to the Bankrupt on an open account and that the title to same passed to the Bankrupt.

2. That there was no agreement between the parties wherein title to the furniture was to be retained in the seller.

SPECIFICATION OF ERRORS UPON WHICH APPELLANT RELIES

I. The execution of the invoice and the printed agreements contained therein by the Bankrupt constituted an agreement wherein title to the personal property sold would remain in the seller.

The Referee's memorandum stated that it was impossible to make a finding that any agreement was entered into between the Petitioner and the Bankrupt by which title to the furniture was retained by the Appellant (Transcript of Record, page 19).

Findings of Fact No. IX provided that there was no agreement between the Petitioner and the Bankrupt by which title to the personal property in question was to be retained by said Petitioner.

II. Where the prices of goods sold were not ascertained by the parties at the time the Bankrupt signed the title retention agreement on the invoices; this constitutes an executory contract with a reservation of title until the final contract and the ascertainment of price shall have been agreed by the parties.

Findings of Fact No. X provided that no verbal contract was entered whereby the title to the property in question was to be retained by the Appellant (Transcript of Record, page 22). The referee concluded, as a matter of law, that there was no contract in existence by which title was retained to the personal property in question by the Appellant (Transcript of Record, page 23).

III. Title to the personal property did not pass to the Bankrupt, and does not now rest in the Trustee in Bankruptcy.

The memorandum by the Referee provided that there being no contract by which title was retained, the delivery of the property to the Bankrupt passed title to him, and that the title now rests in the Trustee (Transcript of Record, page 19).

Paragraph III of the Conclusions of Law of the Referee provided that when the personal property in question was delivered to the Bankrupt, title did then pass to the Bankrupt, and now rests in the Trustee herein, H. M. Gerson (Transcript of Record, page 23).

IV. The parties did not intend that title to the personal property in question should pass at the time of delivery and at the time the invoices were executed by the Bankrupt.

V. Under the facts in this case, and under the evidence, the transaction was a rental or lease agreement with a reservation of title in the seller until the rental payments equaled the purchase price of the personal property sold, and that such an agreement is a conditional sales contract.

Findings of Fact IX and X provide that no agreement was entered into between the parties, by which title to the personal property in question was to be retained by said Petitioner; and that no verbal contract to this end was made (Transcript of Record, page 22). On the Conclusions of Law the Referee held that the

written material on the invoices heretofore mentioned does not constitute a contract (Transcript of Record, page 23).

ARGUMENT

I.

The only witness appearing for the Appellee was Robert B. Steinberg, the Bankrupt. He admitted that the invoices dated February 14, 1953 and the invoice dated February 16, 1953 on which there was a title retention agreement *and* a receipt bore his signature; and that he examined the invoices containing the agreement clause and the receipt before signing same (Transcript of Record, pages 49, 50 and 51). He further testified that the Appellant told him that as soon as he could they would get together and determine the exact amount of the purchases, the amount of the trade-in allowance and the preparation of the necessary papers (Transcript of Record, page 52).

The Findings of Fact by the Referee, that is, Finding of Fact No. III and No. IV, stated that the transaction between the Bankrupt and the said Louis Gold was evidenced by certain documents, including invoices and delivery sheets, and that certain of the invoices bear the signature of Robert B. Steinberg, the Bankrupt (Transcript of Record, page 21). Finding of Fact No. VI stated that none of the blank spaces in the printed matter was filled in. Finding of Fact No. IX provided that there was no agreement between the

Petitioner and the Bankrupt by which title to the personal property in question was to be retained by said Petitioner (Transcript of Record, page 22).

It is submitted that there is no evidence in the record justifying Finding No. IX.

The Title Retention Agreement and the receipt for the merchandise were distinct and separate, requiring separate signatures. The statements were contained within the body of the invoices which plainly purported to embrace the agreement between the parties, which thereupon became binding upon acceptance of the furniture, regardless of whether the person accepting had actual knowledge of all the terms. They were an integral part of an accepted agreement embodied in the writing contractual in its nature, and could no more have been ignored than any other provisions of a written contract. The fact that the amount of the purchase price was a blank space, nevertheless does not change the above stated rule.

Professor Williston in his treatise on CONTRACTS (Volume I, Page 165) states:

> "The sole question seems to be whether the facts present a case where the person receiving the paper should, as a reasonable man, understand that it contained the terms of the contract which he must read at his peril and regard as part of the proposed agreement."

The general rule can be stated that an invoice, standing alone is not a contract; unless there is a statement

thereon and the buyer assents or he is charged with the knowledge of such statement as to the transactions.

India Paint Co. vs. United Steel Products Corp., 123 Cal. App. 2d, 597, 608.

In the instant case, the Bankrupt read the invoices and signed the title retention agreement contained thereon, as well as the receipt for the merchandise.

A case on disclaimer of a warranty was decided in *Lomari vs. Globe,* 35 Cal. App. 2d, 248, where it was held that in a suit for damages resulting from the death of hogs due to a lack of effectiveness of the serum, the language on the labels of all of the bottles of medicine "No control of diagnosis, method of administration, or handling of this Serum after it leaves our possession, we waive all responsibility following its use" is to be construed to be a disclaimer or at least a limitation on the liability of the defendant for an alleged warranty.

In the case of *Hawkins vs. Frick-Reid,* 154 Fed. 2d, p. 88, involving an action to recover the purchase price of an allegedly defective drill pipe on the grounds of breach of an express and implied warranty, the court held that the invoice was the contract between the parties, and the dispute was simply as to the construction of the language therein.

Let us assume that the invoice of the property in question and the alleged title retention agreement were two separate documents, and that the Bankrupt had signed the title retention agreement even though the

spaces as to the amounts of the purchase and the payments to be made were left blank. Can Counsel for Appellee contend that inasmuch as the spaces were left blank, the agreement does not constitute a contract where in title to the merchandise would be retained in the seller? At the trial Counsel for the Appellee contended that the document was a mere receipt and not a title retention agreement. We admit that the invoice has a receipt printed at the bottom of the document but no one lose sight of the fact that *in addition* to the receipt was a specific title retention agreement which was signed by the Bankrupt. Under the evidence and the law applicable thereto, we fail to see how any conclusion, other than upholding the invoice to be a title retention agreement, can be made.

II.

The evidence shows that on January 23, 1953 the Appellant and the Bankrupt entered into a transaction for the sale and purchase of office furniture and equipment (Transcript of Record, pages 32 and 33); that the Bankrupt agreed to pay $100.00 a month until the purchase price was paid, which was to be determined at the time the Bankrupt's office was completed (Transcript of Record, page 32); that until a formal contract was drawn up the furniture was on a rental basis (Transcript of Record, page 64); and that the goods were not sold on an open account (Transcript of Record, page 68). The Bankrupt testified that the only agreement that was made was that the Appellant would let him pay it out directly to him at the rate of $100.00

per month, and that the deal would not be put through a bank, nor would any interest be charged; that three $100.00 payments were made to the Appellant which were marked "On Account" (Transcript of Record, page 45).

It seems quite clear that here is a typical executory contract where title is to be retained by the seller until the parties get together on a definite purchase price, the buyer agreeing to pay on account payments in the sum of $100.00 per month. The Referee quickly analyzed the situation when he stated at the hearing "What you have here is an executory contract under Section 70-B of the Bankruptcy Act" (Transcript of Record, page 35). What possessed the Referee to change his thinking cannot be reconciled. Certainly no subsequent testimony of the witnesses could affect the original arrangement.

Where in an executory agreement the title is to remain in the vendor, and the price is to be paid in future installments, the sale is conditional and not absolute.

Rogers vs. Bachman, 109 Cal., p. 552;
Perkins vs. Mettler, 126 Cal., p. 100.

Where goods are sold and possession is given to the buyer, under an agreement that the buyer shall make installment payments until the purchase price is paid, and that title to the goods shall remain in the seller, the sale was conditional upon payment and title did not vest in the buyer.

Peronnet vs. Ralph, 112 Cal. App., p. 97;
Lunny vs. Labrucherie, 103 Cal. App. 2d, p. 865.

The fact that the parties left blank the spaces in the agreement for the ascertainment of the purchase price and the amount of the monthly payments does not change the nature of the contract. Strictly speaking, the agreement in question was not a sale of any kind, but only an agreement to sell and the conditional vendee gets nothing more than a conditional right of possession.

Bice vs. Arnold, 75 Cal. App., p. 629;
Hegler vs. Eddy, 53 Cal., p. 597.

III.

It is a fundamental proposition of law that the nature of the transaction must be determined by the intention of the parties.

Peronnet vs. Ralph, 112 Cal. App., p. 97;
Masonic Temple vs. Stockholders Auxiliary, 130 Cal. App., p. 234;
Hannin vs. Fisher, 5 Cal. App. 2d, p. 673.

In determining whether or not title passes, the intention of the parties must be gathered from their words, actions and conduct, and the statutory definitions of intention must be applied.

Section 1738, *Civil Code of California;*
Wilson vs. Buchenau, 43 Fed. Supp. 272;
Nead vs. Specimen Hill, 52 Cal. App. 2d, 475.

The record conclusively shows that it was *not* the intention of the parties that the goods be sold on open account, title passing to the buyer. No evidence has been introduced by Appellee proving a sale on open account. As a matter of fact, such contention was specifically denied by Appellant (Transcript of Record, page 68). The books of account of this transaction was introduced into evidence. There is no entry thereon in connection with the charge on open account of the goods in question; nor does the records disclose the credit for the trade-in allowance for Bankrupt's old furniture (Petitioner's Exhibit No. 2).

The Bankrupt read and signed the title retention clause contained in the invoices; he knew that the furniture was to be paid for on the installment plan. The Bankrupt was a Public Accountant and a businessman, familiar with the installment business, and should have known that it was usual and customary for furniture to be purchased on the installment plan with a title retention agreement. In considering all of the facts and circumstances connected with the transaction, and the testimony of the Bankrupt as to the agreement (Transcript of Record, page 45), it seems clear and unequivocal that it was the intention of the parties that title to the goods was to remain in the Appellant until the parties could get together on the purchase price and execute a formal contract. Any other construction would be an absurdity.

IV.

It is respectfully submitted that under the facts in this case and under the evidence, both oral and documentary, the initial transaction between the parties was a rental agreement with a reservation of title in the seller until they could get together on the price of the goods, and then enter into a formal agreement. (Transcript of Record, page 32 and page 33). Until such time as the parties could get together, the payments to be made by the Bankrupt would be $100.00 a month. These rental payments would be credited "on account" of the purchase price *when ascertained.* This was clearly the intention of Appellant when the entries of the three payments were made on his books. There is no evidence in the record of any different intention.

The authorities in this state hold that a rental agreement of personal property is in effect a conditional sales agreement.

U. S. Machinery vs. International Metals, 74 Cal. App. 2d, p. 5;
22 Cal. Jur., p. 1097;
Peronnet vs. Ralph, 112 Cal. App., p. 97.

In conclusion we respectfully submit that the learned Judge of the District Court erred in adopting the findings of the Referee and affirming his order. In view of the above points and authorities, it is urged that the judgment of the District Court be reversed and that the Appellant be awarded the possession of the

articles of furniture and equipment described in the Reclamation Petition on file herein.

Respectfully submitted,

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